



April 21, 2005

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Noteworthy:

In 2001, Senators Leahy and Schumer wrote President Bush and said that “ABA evaluation has been the gold standard by which judicial candidates have been judged.”

Judge Boyle and Justices Brown and Owen have all met this “gold standard.” Indeed, if a qualified rating from the ABA is the “gold standard,” then Judge Boyle and Justice Owen have met the “24 carot gold standard,” as the ABA rated both “unanimously well-qualified”

Floor Statement of Senator Norm Coleman 4-21-05

Mr. President, I rise to share a few thoughts on the issue of how this body should deal with the confirmation of judges appointed by the President.

When I joined this body, I swore an oath to protect and defend the Constitution of the United States. That document gives each Senator the responsibility to give “advice and consent” to judges appointed by the President. The Constitution does not talk about filibusters or cloture votes. It just gives me that job to do. We now have in place a historically unprecedented set of circumstance that has prevented me from fulfilling that responsibility: partisan, leadership-directed filibusters of federal judges to prevent their nominations from coming to a vote.

I spent eight years as a mayor and I learned a lesson I'll never forget. When the process gets in the way of the outcome, you change the process, not the outcome. We confront a similar situation here.

The Senate is democratic institution like no other in the world. It is designed to elevate the principle of protecting minority rights and view points to the very pinnacle of this government. It is our nation's safeguard against ideas that have a temporary popularity, but don't serve our best interests long term. In the famous, apocryphal story about Jefferson and Washington, the Senate is the saucer that cools the hot liquid so it can be safely drunk. I understand and value the role of unlimited debate now as a Senator more than I did as an outsider looking in.

But the Senate is not a rigid, ancient relic that has remained static for these 200 plus years. The Senate is a great institution because over the generations it has found a way to stay faithful to its ideals and get its work done at the same time. We are at such moment.

Let me illustrate it this way. Mr. President, this (hold up) small booklet is a copy of the Standing Rules of the Senate. It is 71 (thumb to the back) pages long. It is very simple, straightforward and with a refreshingly small number of rules.

This (hold up) fat book, on the other hand, is called Senate Procedure. It has (thumb) 1608 pages. This book (right hand) is the interpretation and application of what this book ((left hand) means. The Senate proceeds by precedent. In a body of this many lawyers, issues come up about what the rules hold. They are presented to the Chair. Once the chair rules, that is the procedure of the Senate until a new precedent is made. This Procedure book is literally hundreds of pages of times precedents have been made and changed by this body.

On several occasions, when Senator Byrd was Majority Leader, and directly responsible for getting the Senate's work done, he established new precedents specifically in the area we are debating: the filibuster rule. They are called "the Byrd precedents." In 1977, 1979, 1980, and 1987, these new precedents either limited the right to extended debate in this body, or removed from the Senate the right to decide certain questions ordinarily reserved to it rather than the presiding officer.

So, there is nothing earth shattering about the Senate establishing precedents or clarifying rules. In fact, let me tell you what my predecessor in the United States Senate said in 1969. The late, great Hubert H. Humphrey from the Great State of Minnesota said,

"There is perhaps no principle more firmly established than the constitutional right of the Senate under article I, section 5 to 'determine the rules of its proceedings.' The right to determine includes the right to amend. No one has ever, to the Chair's knowledge, seriously suggested that a resolution to amend the Senate rules required the vote of more than a simple majority. On a par with the right of the Senate to determine its rules, though perhaps not set forth so

specifically in the Constitution, is the right of the Senate, a simple majority of the Senate, to decide constitutional questions.”

My point is not to make Vice President Humphrey’s point so much as it is to simply underscore that what the majority proposes to do today in terms of clarifying the rules is a hardly novel concept.

But now that the shoe is on the other foot, members of the Minority are talking as if establishing a precedent is some sort of Constitutional obscenity, when the Senate has done it thousands of times over the last two hundred years, many times at their request.

The Senate is between a rock and hard place. We have a Constitutional responsibility, not to vote on cloture motions, but to give advice and consent. But the Minority has adopted the practice, not once but many times, of preventing the Senate from doing its job via the filibuster.

There is a misnomer being thrown around. An attempt by the current Majority Leader to set a new precedent on the specific matter of confirmation of judicial nominees is being called the “nuclear option.”

I think it is being applied to the wrong side of the argument.

It is the Minority that has exercised a “nuclear option” time and time again. We are supposed to be the world’s greatest deliberative body. We discuss. We debate. We try to reach consensus and often we do. But in extreme cases Senators resort to the filibuster. But what the Minority has done is go “nuclear” – literally blowing up the process - in a way that’s never been done in the history of the Senate.

They are filibustering qualified judges who have bipartisan support under the management and direction of their leadership.

I must say to the leadership on the other side of the isle, if you fear the consequences of a new precedent, you are reaping what you have sown.

The Senate must get its work done. These courts need judges to allow justice to be done on a timely basis. The Senate is about to do what it has done countless times before (hold up Procedure): set a limited new precedent that allows us to fulfill our Constitutional responsibility to give advice and consent.

Let me make myself clear, if we were talking about a precedent relative to the legislative calendar, I would come over to your side of the argument in a minute. Even though I object to it on substance, I support your right to filibuster the energy bill and the malpractice bill and the highway bill and on and on and on.

But when you prevent the Senate from achieving its Constitutional requirement to give advice and consent – vote yes or no – you leave the body no choice but to make a specific

change or, perhaps more to the point in this case, a clarification in the precedent to allow that to happen.

We bend over backwards to protect minority views in this Senate, but eventually majority has to rule. A duly elected president and duly elected members of the Senate have a right and responsibility to do what they were elected to do.

The best traditions of the Senate, and the best interests of our nation, require us to do that. And speaking as one member of the majority, we are not going to be intimidated into failing that responsibility.

FRIST COMMENDS SENATE JUDICIARY COMMITTEE

WASHINGTON, D.C. – U.S. Senate Majority Leader Bill Frist, M.D. (R-TN) today made the following statement after the Senate Judiciary Committee reported out the nominations of Janice Rogers Brown and Priscilla Owen.:

“I commend the Senate Judiciary Committee for approving the nominations of Janice Rogers Brown and Priscilla Owen.

“In the last Congress, these highly qualified women were blocked by a partisan filibuster when Democrats refused to give them an up or down vote.

“Soon, all 100 Senators will have to decide if these highly qualified candidates will get a fair up or down vote on the Senate floor.”

Sen. Hutchison Statement on Justice Owen, “Constitutional Option”

‘If certain senators have differences with the president’s nominees, they can voice them with their vote – just as the American people did when they re-elected President Bush and Republican majorities in the House and Senate.’

WASHINGTON – Sen. Kay Bailey Hutchison (R-TX), Vice Chairman of the Senate Republican Conference, today issued the following statement regarding the Senate Judiciary Committee voting to approve the nomination of Texas Supreme Court Justice Priscilla Owen to the federal bench. She also commented on the “Constitutional Option” for voting on judges in the Senate:

“Justice Owen is an exceptional jurist who is committed to the Constitution and her community. I know her personally and I admire her dedication to the law and public service. Her professionalism is widely admired across my state. She, and the nation, have waited entirely too long for her leadership.

“A minority in the Senate has blocked her confirmation to the U.S. Court of Appeals for nearly four years. These obstructionists have done so even though – when

she was re-elected to the Texas State Supreme Court in 2000 with 84 percent of the vote – every major newspaper in Texas endorsed her candidacy. They have done so even though the American Bar Association unanimously rated her ‘well-qualified.’ They have done so even though this vacancy is a judicial emergency – open since January 23, 1997. They have done so, even though she received more than the 50 votes every time the motion to proceed has come to a vote on the Senate floor.

“They have gotten away with obstructing by exploiting the filibuster and denying Justice Owen a direct vote. Now, unfortunately, we must take action to ensure President Bush’s nominees are getting the up-or-down vote they deserve.

“Over a year ago I announced my support for the ‘Constitutional Option.’ This would finally grant President Bush’s nominees their Constitutional right to a vote. It would also preserve the right of every senator to advise and consent on presidential nominees. And it would not affect the legislative filibuster.

“If certain senators have differences with the president’s nominees, they can voice them with their vote – just as the American people did when they re-elected President Bush and Republican majorities in the House and Senate.”

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Santorum Comments on Democrats’ Extreme Judges Rhetoric

Washington, D.C.—Senator Rick Santorum (R-PA), chairman of the Senate Republican Conference, commented about the Democrats’ unfair portrayal of filibustered appeals court nominees Priscilla Owen and Janice Rogers Brown as out of the mainstream, both approved today by the Judiciary Committee after being re-nominated by President Bush.

"The Democrats’ trashing of these distinguished judicial nominees is what is truly extreme.

“Partisan Democrats are reengaged in their ‘fear and smear’ campaign to mislead the public about mainstream, majority-supported nominees and block up-or-down votes that would confirm them.

“I ask my Democratic colleagues to tone down the rhetoric and give them a fair, up-or-down vote.”

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Fox News Live – John Thune

4/21/05 10:14 am ET

JOHN SCOTT: Joining us now from Capitol Hill, Republican Senator John Thune with his take on the process. Senator, good morning.

JOHN THUNE: Good morning.

SCOTT: is this a battle republicans think can you win?

THUNE: I think we're right constitutionally. We're right with respect to the 214 years up until the last Congress of precedent, history and tradition in the United States Senate, Jon. When nominees are sent forward by the president, they're disposed of. They get an up and down vote. I think the American people see this as a basic issue of fairness. When a nominee comes before the United States Senate, the Senate ought to perform the constitutional responsibility and accord them the up and down vote that Constitution requires.

SCOTT: but are you worried that the American people might also see that it's sort of wrong to go tinkering with senate rules that have been in place, not maybe since the founding republic, but for a long time?

THUNE: Well, first off, there's a confusion out there about what actually is being done here. This is simply dealing with judicial nominations. It doesn't deal with legislative filibusters. That's entirely different matter. But the reality is this isn't about changing rules. This is about simply re-establishing the precedent that has been in place in this country for over 200 years. Our founders and the people who wrote our Constitution expected that the Senate would be acting on the judicial nominations. In the last congress and continuing into this one, the democrats have decided that they want to block and prevent and filibuster the good nominees from being voted on. That's wrong. There is no precedent for that historically. And it clearly this is a responsibility that the United States Senate has in the constitution to insure that those nominees that are put before it are debated and let's have a full and spirited debate. Vote them up or down. If people want to vote against them, they can vote against them. All we're simply saying is that the matter of fairness that nominees ought to have an up and down vote.

SCOTT: do you see a potential backlash against democrats who don't give the president's nominee that's up or down vote that you're looking for?

THUNE: I think what the Democrats have said, Jon, is that if Republicans press to get an up and down vote on the nominees that they're going to shut down the Senate. That would be tragic there are too many important things we need to deal with. We have a highway bill that is ready to go, an energy bill with skyrocketing gas price that's needs to be dealt with. These are important legislative initiatives that are important to the American people. I think that the American people understand what this issue is about. It's important that we get these nominees voted on and furthermore that democrats not use this as an excuse to shut down the Senate and keep the other important legislative initiatives from moving forward.

SCOTT: Priscilla Owens is one of those who was put forward before by the president and he seems bound and determined to get her name out there again. why are -- why is the democratic side, you know, telling the president don't do it? what is it about her record that they don't like?

THUNE: They don't like conservative judges simply. And special interest groups that call the shots, I think, for the Democrats around here. She was approved the last time she faced the voters of Texas with 84% of the vote. Janice Rogers Brown, another nominee from California, the last time she faced the voters got a 76% vote. these are people that are supported by the people that they serve already. And Priscilla Owens has been sitting here for four years waiting for a vote on the floor. Janice Brown has been sitting around for 21 months waiting for a vote on the floor of the United States Senate. That's wrong. With these -- these are good people that put their names forward for public service. It's a responsibility of the United States Senate or the Constitution and with respect to 214 years of history and tradition to allow these nominees to be voted up or vote them down. Just give them a chance to be voted on if you don't like them, vote against them and reject them. If you do, you can vote to confirm them. But if they had a chance on the floor of the United States Senate would have majorities in favor of confirmation.

SCOTT: thank you.

THUNE: Thanks, Jon.

Floor Statement of Senator John Thune, 4/21/05

Mr. Thune: Mr. President, I rise today in Morning Business to speak about a matter of great importance, and that is our broken judicial nomination and confirmation process. The Senators -- as Senators, we have sworn to support and defend the constitution. And on the issue of judicial nominations, the Constitution is straightforward. It states that the President nominates judges and the Senate has the duty to give its advice and consent on those nominations. And for over 200 years, that is exactly how it worked, regardless of which party was in power. Over the past two years, Mr. President, the Democrat Minority has attempted to change the rules and stand 200 years of Senate Tradition on its head. The Democrat Minority now thinks that 41 Senators should be able to dictate to the President which judges he can nominate. The minority also thinks that it should be able to prevent the rest of the Senate from fulfilling its Constitutional duty of voting up or down on judicial nominees. The Democrats' position is contrary to our Constitution, our Senate traditions and the will of the American people as expressed at the ballot box this past November.

And, Mr. President, it must stop. Mr. President, the add advise and consent rule, provision of the constitution has served us for over 214 years, up until the last Congress. That meant that the Senate should vote. And for over 200 years no nominee with majority support has been denied an up-and-down vote in this body. None. Zero. The Democrats have said that they have confirmed 98% of the President's nominees. The actual number,

Mr. President, is 89%. But even at that, are we here to say that we're only going to follow the Constitution 89% of the time? Furthermore, their record, Mr. President, on appellate court nominees, this Senate's record on dealing with the President's nominees is the worst for any President in modern history. This President's record of having his appellate court nominees voted on is 67%, which ranks him lowest of any President in modern history. It would be one thing if these nominees didn't have the votes for confirmation. But they do. These nominees will have 54 or 55, 56, 57 votes for confirmation, Mr. President, and it is wrong to deny them what the Constitution says they deserve and for us to ignore our constitutional responsibility to see that they have an up-and-down vote in this body. The Dems have said it is their prerogative to debate. That's great.

Let's debate them here on the floor. But before you can debate them, you have to be able to bring a nomination to the floor of the United States Senate for debate. We have a right to debate here in this institution in the Senate. They have also suggested that judges ought to have broad support. They ought to have more than the necessary 51 votes for the simple – or the simple majority that has traditionally been the case here in the Senate. Well, Mr. President, there is nothing in the Constitution about filibustering judges. There is nothing in the Constitution about requiring a super majority to confirm judges. If the Founders wanted judges to get a super majority vote, they would have put that in there. They did it for treaties, for Constitutional Amendments, for overriding a Presidential veto. Clearly that was not the case with judges. It was the Founders' intention that the senate dispose of them with a simple majority vote. The Democrats in the chamber, Mr. President, have said that what we're trying to accomplish here is -- quote -- "the nuclear option." suggesting that somehow this is a radical process that we're trying to implement here. Well, simply that's not true, Mr. President. There is nothing nuclear about doing and reestablishing the precedent that has been the case and the practice and the pattern in this United States senate for over 200 years. Mr. President, what is nuclear is what is being discussed by the Democrats in the Senate, and that is shutting this senate down over the issue of judicial nominees, which means important legislation to this country, like passing a highway bill that will create jobs and growth in this economy, could get shut down. Or an energy policy which is important in my state of South Dakota. We've got gas prices at record levels. We've got farmers going into the field. The tourism industry starting its season. We need to do something to help become energy independent. I'm very interested in the issue of renewable fuels. I want to see as big a renewable fuels standard as we can possibly get in this energy bill, but we have to get it to the floor to debate it.

First. And we can't have these attempts, these threats. And I hope they are just that -- threats -- Mr. President, because it would be tragic, it would be nuclear if the other side decides to shut this senate down over the issue of judicial nominees. Mr. President, the Democrats in this chamber have tried to confuse the issue of legislative and judicial filibusters. Clearly, trying to confuse the public about what this means. What we are talking about here, Mr. President, is simply the narrow issue of judicial nominees. It's part of this body, the United States Senate's constitutional responsibility and duty, it is a responsibility that we must take very seriously. However, in the last Congress that became extremely politicized, Mr. President. And what we are talking about, again, is simply the issue of judicial filibusters. It was the Democrats, incidentally, who last voted

on the filibuster in the Senate to do away with it, back in 1995,6,7,8,9 it was a 76-19 -- -- it was a 76-19 vote. Twas legislative filibusters. Many of those Democrats who voted to end the filibuster still serve in this institution today. But the American people, Mr. President, see this as an issue of fundamental fairness. They understand that this body's constitutional obligation and responsibility and duty is to provide the advice and consent, and that means an up-and-down vote in the United States Senate. Mr. President, the Democrats in the United States Senate have said that these -- this President's nominees are extreme. Well, there are going to be a couple of them reported out of the Judiciary Committee, I think, later today. Janice Rogers Brown got 76% of the vote the last time that she faced the voters in California, which isn't exactly a bastion of conservatism. She has been stalled out -- her nomination -- in this senate for 21 months. Priscilla Owen, who will also be reported out today, got 84% of the vote the last time that she faced the voters in Texas. She's been waiting around here for four years. Four years in the United States senate to get an up-and-down vote on her Nomination. She was endorsed by every major newspaper in the state of Texas. Mr. President, these nominees are not extreme. What is extreme, Mr. President, is denying these good nominees a vote, and it detracts the role and responsibility that the founders gave the united states senate. So, Mr. President, as we embark upon and engage in this debate that is forthcoming on judicial nominees, let's keep insight and in focus here the facts, the role, the responsibility this institution has to perform its duty. And that is to make sure that when good people put their names forward for public service that they at least are afforded the opportunity that every nominee with majority support throughout this nation's history has had. And that is the chance to be voted on in the United States Senate. Mr. President, I fully support what the other side is saying about wanting to debate these nominees Let's do it. I am certainly willing and hopeful that we'll be able to engage in a spirited and vigorous debate. Let's debate. But then, Mr. President, let's vote. I yield the floor.

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Mr. Thune:

I respect the gentleman from Nevada, and I appreciate everything he has to said about wanting to move the Highway Bill. Because the Highway Bill, the energy bill, the asbestos bill, those are all things that need to be done. My concern in all this -- and the Senator from Nevada obviously has been here long enough to know this -- is that the Senate does set its rules and procedures. Back in 1980 the Senate exercised essentially the same thing we're talking about doing here when the Democrats had control under Senator Byrd. But more importantly, Madam President, this needs to be based on facts and the facts are on our side in this debate. If you look back -- and the Senator from Nevada talked about historical precedents. The reality is what I said earlier is absolutely accurate and that is there has not been a judicial nominee with majority support in the history of this nation up until the last congress that was denied an up-and-down vote in the United States senate by filibuster, or by using the rules of the Senate to prevent that from happening. That simply is a fact. And it's also a fact, Madam President, that in the instance that he referred to back in 1968, the Fortas nomination to the high Supreme Court, President Johnson's selection for Chief Justice, that that was a bipartisan attempt. That was also -- or, I should say a bipartisan attempt. It was a judge they were raising ethical issues by the nominees we are referring to here are people of high quality, people

who have been rated by the American Bar Association as being highly qualified filed to serve on the bench. They are not extreme, as the Democrats have suggested. They are judges who have been voted on in their states and won overwhelming majorities. It is about the tradition, it is about the precedent. It is about the history of the United States Senate and it is about the Constitution and the responsibility that, as Senators that we have to see that these judicial nominees that are presented by the President for confirmation or for the Senate to perform its advise and consent rule here are dealt with in an appropriate way, and the gentleman from Nevada, I hope, will work with our leadership to try and fashion a way in which these judges can be voted on in the United States Senate. If they are not, we are setting an entirely new precedent for the future of how these judicial nominees are going to be considered in the United States Senate. Because this is unprecedented in the history of this nation what has happened in the last session of Congress and what is being suggested by the Democrats in the Senate this time, and that is that they will shut this institution down and keep other legislation from moving forward simply because they want to dictate to the majority and to the President of the United States about the kind of judges that he ought to be submitting to the Senate for confirmation. So, Mr. President, I have a couple other colleagues here that I think want to speak to this issue. But it is important that this debate be about the facts. I hope we can have an opportunity to debate these judges and then I hope we have the opportunity to vote on them.